

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3316 OF 2002
IN
SUIT NO.3853 OF 2002

- 1) Mrs.Tarla N. Morjaria)
of Mumbai, residing at 11, Laxmi)
Mahal, Bapubhai Vashi Road, Vile)
Parle (W), Mumbai-56.)
- 2) Mrs.Usha S. Somana)
at present residing at 10-A)
Park Avenue, Finchely)
London N32 EJ, UK.)
- 3) Mrs.Bharati V. Tanna)
residing at Flat No.14,)
34, Krishna Building, 2nd Floor)
6th Khetwadi Lane, S.V.P. Road)
Mumbai).. PLAINTIFFS

Versus

- 1) Mr.Bipin Hiralal Shah)
- 2) Mrs.Pushpa Bipin Shah)
both residing at 34, Krishna)
Building, 2nd Floor, 6th Khetwadi)
Road, S.V.P. Road, Mumbai 400 004.).. DEFENDANTS

Mr. S.F. Rego with Mr.N.J. D'Monte for the Plaintiffs.

Mr.Chirag Balsara with Ms.Falguni Thakkar i/b.M/s.
Rustomji & Ginwala for the Defendants.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 28TH APRIL 2006

JUDGMENT PRONOUNCED ON : 5TH JUNE 2006

JUDGMENT :

. This Notice of Motion has been taken out for a
direction against the Defendants to pay the Plaintiffs a

sum of Rs.9,653/- per month by way of mesne profits/ compensation for the illegal use and occupation of the suit premises in Flat No.13 situate at Krishna Building, 6th Khetwadi Lane, S.V.P. Road, Mumbai. An injunction has been sought against the Defendants from transferring, encumbering, alienating, disposing of or creating third party interests in respect of the suit premises. A further prayer for the appointment of the Court Receiver in respect of the suit premises for taking possession of the same from the Defendants and handing it over to the Plaintiffs is also made.

2. When the matter was heard for ad-interim reliefs, the Defendants were enjoined from transferring, encumbering, alienating, disposing of or creating third party interests in respect of the suit premises. Thereafter, on 25th April 2003, after pleadings were complete in respect of the Motion, this Court has framed preliminary issues in respect of the jurisdiction of the Court to entertain and try the Suit and the ownership of the flat. A Commissioner was appointed to record evidence. That task having been completed, the Plaintiffs seek the interim relief in the present Motion.

3. One Karsandas Jivraj was the owner of Krishna Building situate at 6th Khetwadi Lane, S.V.P. Road,

Mumbai. He had settled this property on trust. The Plaintiffs who are sisters, their three brothers and their cousins were the beneficiaries of the trust, being the grand children of the settlor of the trust. A Suit being S.C. Suit No.8691 of 1968 was filed by the Plaintiffs' cousin, Laxmiben against the Plaintiffs and their brothers as also certain other family members in respect of the trust property. Consent Terms were filed on 5th April 1978 and the Suit was decreed in these terms. Under these Consent Terms, it was agreed that the Plaintiffs and their brothers were to be the absolute owners of Krishna Building as tenants in common each having 1/6th share in the property. The Plaintiffs' brothers surrendered their right, title and interest in Flat No.13 in Krishna Building to the Plaintiffs. Accordingly, the Plaintiffs had exclusive right over this flat. The original tenant one Govind G. Shah who was occupying Flat No.13 surrendered his tenancy to the Plaintiffs and their brothers in November 1993. The Plaintiffs learnt that the Defendants were residing in the said flat and were occupying one room (hereinafter referred to as the suit premises) in order to look after the members of the family of Govind G. Shah. Exhibit "A" to the Plaint is a sketch of Flat No.13 which demarcates the area occupied by the Defendants and the area used by all the occupants of the flat. According to the Plaintiffs, the Defendants were

gratuitous licensees in the suit premises and are liable to be evicted since their licence has been terminated and the tenancy of the flat has been surrendered to the landladies. The Suit filed is for evicting the Defendants and for mesne profits for the illegal use and occupation of the suit premises.

4. The Defendants have contended that they are sub-tenants of the Plaintiffs and their brothers and tenants of Govind G. Shah. According to them, they obtained the suit premises on rental basis from Govind G. Shah on 15th August 1972. They contend that in view of the amendment of 1973 to the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, a sub-tenant who is in occupation of premises prior to 1st February 1973 by operation of law becomes the tenant of the original landlord. The Defendants have, therefore, urged that no relief can be granted to the Plaintiffs as this Court has no jurisdiction to entertain and try the Suit. According to the Defendants, it is only the Small Causes Court which would have the jurisdiction to decide on the relationship between the Plaintiffs and the Defendants. They contend that they were in exclusive possession of the suit premises even after Govind G. Shah allegedly surrendered the tenancy of Flat No.13. The Defendants have pleaded that the Plaintiffs' brother Pravinchandra Tanna was occupying Flat No.13 after Govind G. Shah

vacated the same. According to the Defendants, they were in occupation of the suit premises even when Pravinchandra Tanna was residing in Flat No.13. They have contended that they had telephone bills in their names. Their electoral card and passports also bear the address of the suit premises. According to the Defendants, they have paid rent at the rate of Rs.200/- per month till November 1993 to Govind G. Shah. The Defendants have then contended that the Suit should be dismissed for non-joinder of necessary parties since the Plaintiffs are not the owners of the suit premises.

5. In view of these contentious issues raised by the parties, the following issues have been framed as preliminary issues for determining the rights of the parties :-

- (1) Whether this Court has jurisdiction to entertain and try this Suit ?
- (2) Whether the Plaintiffs prove that they are owners of the said flat ?

6. The Plaintiffs have led evidence of one Minal Morjaria, their Constituted Attorney and the daughter of Plaintiff No.1. She has deposed that under the family arrangement, which was reduced into the Consent Terms dated 5th April 1978 filed before the City Civil Court in S.C. Suit No.8691 of 1968, the Plaintiffs and their

three brothers were entitled to equal shares in Krishna Building. By a writing dated 1st July 1997, Pravinbhai, one of the brothers, surrendered his rights in Flat No.13 in favour of the Plaintiffs. Similarly, on 2nd July 1997, the other brothers Dhirubhai and Arvindbhai surrendered their rights in favour of the Plaintiffs. She has further averred in the affidavit filed in lieu of examination in chief that Govind G. Shah who was a tenant of Flat No.13 had without the permission of the Plaintiffs or their predecessors in title, inducted the Defendants as paying guests to look after himself, his wife and his mother, both of whom were ailing. She has further deposed that when Govind G. Shah surrendered his tenancy rights to the Plaintiffs and their brothers in 1993, the Defendants had agreed in her presence to vacate the suit premises within six months. However, according to her, the Defendants continued to occupy the premises as gratuitous licensees without payment of any rent, charges, licence fees or compensation. By a letter dated 22nd March 2002 which has been produced on record, Kirit G. Shah, the son of the erstwhile tenant had confirmed this position that the Defendants were introduced into the suit premises as paying guests for looking after the parents and his grand mother. Minal Morjaria has further deposed that the electricity meter of the flat which including the suit premises is in the name of the Plaintiffs. The electricity charges are

being paid by the Plaintiffs. She has further averred that despite several letters from herself and the Plaintiffs, the Defendants continued to reside in the suit premises without the Plaintiffs consent after termination of their gratuitous licence. She has further averred that certain alterations have been made by the Defendants in respect of the suit premises without prior permission from the Plaintiffs. The witness Minal Morjaria has deposed that the Defendants are gratuitous licencees.

7. This witness has been cross-examined extensively on behalf of the Defendants. Her deposition in the examination-in-chief has not been shaken and she has stood her ground in the cross-examination. The Defendants were unable to elicit any admissions from this witness, which were contrary to the averments in her affidavit and the pleadings of the Plaintiffs.

8. The Plaintiffs have also examined Arvindbhai, their brother, who has corroborated the evidence of Minal. He has deposed that by the writings of July 1997, he and his brothers had surrendered their rights, title and interests in Flat No.13 to his sisters, the Plaintiffs. He has stated that Govind G. Shah vacated the suit premises in November 1993 and handed over possession to himself and his brothers and sisters. He

has stated that Minal was also present at that point of time. The witness has further deposed that he learnt of the Defendants' presence in Flat No.13 only when it was vacated by the tenant, Govind G. Shah. He and his siblings as well as Minal were informed by Govind G. Shah that the Defendants were inducted into the suit premises to look after him and the members of his family and that they would vacate the premises within six months. He has also deposed that the Defendants had in turn assured him and his siblings in the presence of Minal that they would vacate the suit premises within six months after Govind G. Shah had surrendered the tenancy. He has also corroborated the testimony of Minal that the Defendants had not at any point of time paid any rent or compensation to either Govind G. Shah or the Plaintiffs or their brothers or their predecessors in title. He has deposed that Govind G. Shah had surrendered the tenancy in writing. He has identified the signature on the letters surrendering the tenancy. He has stated that he, his brothers, sisters and Minal were present when the writing was executed by the erstwhile tenant and that he handed over the possession of the flat to the six siblings. The witness has clarified regarding the issuance of rent receipt in respect of Krishna building. He has deposed that prior to 1968, his father was issuing the rent receipts. The property was with the Court Receiver from 1968 to 1978

and after 1978, his father again started issuing rent receipts upto April 1989. After 1989, the brother of Plaintiffs, Dhirubhai issued the rent receipts and Govind G. Shah used to pay the rent to him at times. The witness has denied the suggestion put to him that Flat No.13 belongs to the three brothers and sisters as co-owners. He has stated categorically that Flat No.13 is owned only by the three sisters. The witness has also stated that no action was taken against the Defendants since 1993 only because Defendant No.2 requested them to refrain from taking possession as Defendant No.1 was in jail. He has denied the suggestion that he knew that the Defendants were in possession of the suit premises since 1972 and that they were in possession of the suit premises with the consent of the landlord.

9. Defendant No.2 has examined herself in support of her case. She claims to have entered the suit premises on 15th August 1972, after her marriage with Defendant No.1. The suit premises which consist of one room, admeasuring 165 sq.ft. (carpet) are smaller than the premises which she claims to have occupied prior thereto. She has averred in her affidavit in lieu of examination in chief that her husband, Defendant No.1, had approached the erstwhile tenant through two brokers. The erstwhile tenant had agreed to permit them to occupy

the suit premises as licencees on payment of a deposit of Rs.5000/- and rent of Rs.200/- per month. She has stated that she was not aware of the details of the negotiations between her husband and the erstwhile tenant. However, she has admitted that these facts were stated on the basis of what her husband had told her. This evidence is hearsay evidence and, therefore, in my opinion, it must be discarded. Apart from this, the witness has not produced any other evidence on record to indicate that the Defendants were in fact licencees of the erstwhile tenant or that they were in exclusive use and possession of the suit premises. No rent receipt has been produced. Defendant No.2 has very conveniently stated that the rent was being paid in cash to the erstwhile tenant. The witness has then deposed that the rent was paid upto 1997 to Kiritbhai, the son of the erstwhile tenant. However, neither the erstwhile tenant nor his son have been examined by the Defendants. Defendant No.2 has deposed in her evidence that Hasmukh Sanghvi acted as a broker for the Defendants. In her affidavit in lieu of the examination in chief, she has stated that this broker was introduced to them by one Mohite and that Mohite in fact was acting for the Defendants.

10. Hasmukh Sanghvi who was the other witness examined on behalf of the Defendants has stated that

Govind G. Shah agreed to let out the suit premises to Defendant No.1 on leave and licence on a deposit of Rs.5000/- and a monthly licence fees of Rs.200/-. He claims to have received his brokerage from Govind G. Shah while Mohite had received it from Defendant No.1. In his cross-examination, which was recorded on 30th November 2005, he has stated that he was a real estate broker for the past twenty five years. He has been cross-examined in great detail regarding the transactions in which he received brokerage for the past few years i.e. upto the year 2002. He has been able to give the details of only one transaction which took place in 2005. He could not recall the transactions of the earlier years from 2002 to 2004. Strangely he could remember the transaction between Govind G. Shah and the Defendants which allegedly took place in 1972. Although Defendant No.2 has admitted in her cross-examination that Hasmukh Sanghvi was the Defendants' broker, this witness has stated that he met Govindbhai on the road and that he then informed Mohite that the suit premises were available. He has also deposed that he did not get any brokerage from Govindbhai, but it was Mohite who paid some amount to him. He has admitted that besides putting the broker Mohite in touch with Bipinbhai, Defendant No.1, he had not done anything in respect of the transaction. In my view, this witness cannot be believed for more than one reasons. Firstly, it is

surprising that he is able to recall the transaction which allegedly took place in 1972 so clearly, when he could not remember transactions which took place two or three years prior to his deposition. Secondly, he has deposed that he was in this business of broking real estate for the past twenty five years. Obviously, that would mean he was in the business approximately from 1980. Furthermore, he has admitted that he did not receive any amount from Govind G. Shah, although he claimed to have acted as his broker. Therefore, it would not be possible to infer that it was he who had introduced the Defendants in 1972. This witness appears to be a got up witness and his deposition cannot be believed.

ISSUE NO.1

11. On appreciating the evidence on record, the Defendants have not been able to prove that this Court has no jurisdiction to entertain and try the Suit. The pleadings in the plaint unambiguously stipulate that the Defendants were gratuitous licencees in the suit premises. Besides, the bare word of Defendant No.2 that the Defendants were paying the erstwhile tenant a licence fee, there is no other tangible evidence on record to establish this fact. The Defendants' case that they were licencees in 1972 and had become deemed

tenants in view of the amendment of 1st February 1973 has not been proved. Assuming that the Defendants were licencees as contended by them, it is impossible to believe that they would remain quiet and not adopt any proceedings to have themselves declared tenants, either before Govind G. Shah surrendered his tenancy of Flat No.13 or even thereafter. Admittedly, the Defendants have not adopted any proceedings in the Small Causes Court to declare themselves as tenants. Therefore, the contention of the Defendants that they were tenants or in any event licencees cannot be accepted.

12. The evidence on record in fact clearly indicates that the Defendants were gratuitous licencees and, therefore, this Court would have jurisdiction to entertain and try the Suit. In the case of *Ramesh Dwarkadas Mehra vs. Indravati Dwarkadas Mehra*, **2001 (4) Mh.L.J. 483**, the Division Bench of this Court has held that a Suit by a licensor against the gratuitous licencee is not tenable before the Presidency Small Causes Court under Section 41 of the Presidency Small Causes Court Act, 1882. Depending on the valuation, such a Suit would lie either before the City Civil Court or the High Court. Therefore, the submission on behalf of the Defendants that this Court has no jurisdiction cannot be accepted and Issue No.1 is answered accordingly.

ISSUE NO.2

13. Minal Morjaria has been cross-examined by the Defendants in great detail as it is their case that she was instrumental in straining the relationship between the Plaintiffs and the Defendants. She has produced the letters written by Pravinbhai and the other two brothers dated 1st July 1997 and 2nd July 1997 respectively to the Plaintiffs. They have been taken on record and marked "X1" and "X2" for identification as the Defendants had objected to the same being marked as exhibits. The letter dated 22nd March 2002 written by Kirit G. Shah has also been taken on record, but has been marked "X3" for identification. She has stated in her cross-examination that the electricity bills of Flat No.13, including the suit premises, were being paid by her on behalf of the Plaintiffs through two bank accounts. The Defendants' attempt to show that the Plaintiffs were not the owners of Flat No.13 has failed miserably. The witness has narrated the manner in which the Plaintiffs became entitled to the suit premises as exclusive owners. The consent decree in S.C. Suit No.8691 of 1968 is on record and is marked "P2". Under this decree, the Plaintiffs and their brothers were declared to be the owners of Krishna Building. The writings of 1st and 2nd July 1997 have been taken on

record. The witness Minal has identified the signatures of the authors of these letters. Defendants have not been able to establish that the witness was either not aware of the signatures of her three uncles or that she was not aware of the contents of the letters dated 1st and 2nd July 1997. Minal has deposed about the contents of both the letters. She has identified the signature of Pravinbhai, the Plaintiffs' brother, on the letter dated 1st July 1997. Arvindbhai who was one of the signatories to the letter of 2nd has deposed regarding its contents. He has identified his signature and that of his brother, Dhirubhai, on this letter. Besides this he has stated categorically that he and his brothers had surrendered their rights to Flat No.13 in favour of the Plaintiffs. The letters of 1st and 2nd July 1997 at "X1" Collectively and "X2" respectively, have therefore been proved. Once these letters have been held to be proved, it must be accepted that the Plaintiffs are the exclusive owners of Flat No.13. Accordingly, Issue No.2 is answered in the affirmative. The Plaintiffs have proved that they are owners of Flat No.13 of Krishna Building, 6th Khetwadi Lane, S.V.P. Road, Mumbai.

14. It is now necessary to consider whether the Plaintiffs have made out any case for granting interim relief. It is the case of the Plaintiffs that Defendant No.1 was indulging in illegal activities in the suit

premises which they learnt about from one of the Gujarati newspapers. The Plaintiffs have also contended in their affidavit in support of the Motion that Defendant No.1 had been arrested for these illegal activities and is now in jail. The Plaintiffs, therefore, contend that it is necessary to evict the Defendants from the suit premises in order to protect the same. Apart from this, the Plaintiffs contend that the Defendants have been illegally continuing in the premises even after the tenancy was surrendered by Govind G. Shah and the gratuitous licence was determined. Therefore, the Plaintiffs claim that the Defendants be ordered to pay mesne profits for use and occupation of the suit premises. The Plaintiffs have also prayed that the Court Receiver be appointed in respect of the suit premises for handing over the possession of the same to the Plaintiffs.

15. Having considered the submissions made on behalf of the parties, I am of the view that interests of justice would be served by appointing the Court Receiver in respect of the suit premises. The Defendants have admittedly been in possession of the suit premises for a long period of time and continue to be in possession of the same. Therefore, in my view, granting the relief claimed by the Plaintiffs of directing the Court Receiver to hand over possession of the suit premises to

the Plaintiffs at this stage would in fact amount to granting the Plaintiffs the final reliefs in the Suit. In my view, therefore, it would be appropriate to direct the Court Receiver to take symbolic possession of the suit premises i.e. one room in the occupation of the Defendants in Flat No.13, Krishna Building, 6th Khetwadi Lane, S.V.P. Road, Mumbai. The Defendants shall be appointed as agents of the Court Receiver in respect of the suit premises demarcated in red in the sketch annexed at Exhibit "A" to the Plaint, on usual terms and conditions and payment of royalty and other charges.

16. The agency agreement to be entered into by the Defendants within eight weeks from today.

17. In the event the Defendants fail to execute the agency agreement within the stipulated time, the Court Receiver to take forcible possession of the suit premises and apply to the Court for further orders in the matter.

18. Notice of Motion disposed of accordingly.

19. Mr.Balsara seeks a stay of this order. In my view, there is no need to stay the order. Stay refused.